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Research on the Compulsory Conciliation System

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Abstract: The Chinese conciliation system, known as the 'Eastern Experience', was born in primitive society, written down in the Western Zhou Dynasty, incorporated into the law formally during the Yuan Dynasty, and became more systematic in the Ming and Qing Dynasties. The traditional Chinese conciliation system has profoundly influenced the modern Chinese conciliation system, which has a long history of development in China. International interactions rise international disputes which give birth to international conciliation, and modern international conciliation formally emerged and developed in the 1920s. Since international conciliation in this period was mainly based on international investigation and conciliation, it embodies the characteristics of investigation and conciliation. Compulsory conciliation, as a breakthrough and development in international conciliation, is procedurally mandatory but the consequences are not binding. With the successful compulsory conciliation case between Timor-Leste and Australia, the international community has given more attention to compulsory conciliation. Compulsory conciliation, which blends the compulsion of arbitration and litigation procedures and the flexibility of traditional conciliation procedures, also has certain drawbacks. The local delay in development owing to COVID-19 does not prevent the occurrence of investment disputes. This article intends to conduct a preliminary research on the compulsory conciliation system in order to prepare the basis for the application of compulsory conciliation to investment disputes, as well as to the Belt and Road investment disputes.

1. Introduction

From the creation and development of 'conciliation' to the germination of 'international conciliation' and the establishment of 'compulsory conciliation', a long journey of a many years has passed. As well as negotiation, investigation, mediation, arbitration and judicial dispute resolution, conciliation has become a method of dispute resolution which has received widespread attention from the domestic and overseas communities. The Chinese conciliation system, which originated in primitive society and was written down in the Western Zhou Dynasty, has profoundly influenced the modern Chinese conciliation system. With the development of Alternative Dispute Resolution (ADR) in the United States, conciliation has enjoyed a worldwide renaissance and has received increased attention and research from the international community.

2. Origin of the Conciliation System

Conciliation is an approach where two or more parties negotiate voluntarily under the auspices of the People's Court, the People's Conciliation Committee and relevant organizations regarding the substantive rights and obligations in dispute, in order to facilitate the parties to reach an agreement and resolve the dispute through education and guidance. In the article ‘Study on some Issues of Traditional Chinese Conciliation System’, ‘conciliation’ is a process of persuasion by a third party after a dispute has arisen, based on social consensus and certain norms, to induce those involved in the dispute to negotiate a settlement [1]. From the above, it can be seen that conciliation is the process of mediating between two or more parties in order to reconcile them.

There is a long history of development of the conciliation system. The Chinese conciliation system, known as the ‘Eastern experience’, was born in primitive society and emerged with the formation of the early state, as recorded in “Han Fei Zi·Nan Yi” during the Warring States period; The written records begin in the Western Zhou Dynasty, with a more detailed account in the “Zhou Li·Di Guan·Tuning People”. In the Western Zhou Dynasty, there was an official post of ‘Tuning People (Adjuster)’, who was responsible for harmonising the difficulties of the people, i.e. someone who was responsible for ‘harmonising’ and mediating disputes; During the Qin and Han dynasties, the 'prefectures and counties' was established. Only officials above the county level enjoyed the right to judge, and below the county level there were the townships, which had a hierarchy of ranks, a miser and the ‘three old men’, i.e. the peasant old man, the worker old man and the merchant old man, who were in charge of the feudal moral ‘edification’ and the task of mediating civil disputes and calming down the lawsuits [2]; The Tang dynasty followed the Qin and Han dynasties; In the Yuan dynasty, it was formally incorporated into the law, i.e., it had legal significance, as exemplified by the article on ‘Li Min’ in the “Tongzhi Joge·Volume 16·Tian Decree”; The Ming and Qing dynasties followed in the same vein as their predecessors, but were more systematic than their predecessors. In the Ming Dynasty, for example, there were ‘affirmation pavilions’, and in the Qing Dynasty, 'Bao-Jia system' was introduced at the grass-roots level below the county and township level. In terms of the types of traditional Chinese conciliation systems, there are three main types of conciliation: civil conciliation, official conciliation, and semi-official and semi-people out-of-court conciliation (or official-approved civil conciliation). The traditional Chinese conciliation system is a distinctive feature of traditional Chinese society and has profoundly influenced the modern conciliation system, for example, the establishment of the ‘Ma Xiwu adjudication methods’. At the same time, the Chinese conciliation tradition is similar to the ADR movement [3] and restorative justice [4] advocated by some Western countries, and therefore, the international community has been paying great attention to the Chinese conciliation system.

In Japan, another Asian country, the use of conciliation was widespread as early as the Kamakura Shogunate (1185–1333) [5]; The earliest records of the use of conciliation in Europe and America to resolve disputes begin in the ancient Greek and Roman periods, and while at that time it was nominally arbitration, it was actually supposed to be conciliation [6,7]. Xu Xin, in his book “Conciliation: China and the World”(2013), mentions that ‘in 1296, the City Council of Paris appointed 24 mediators to assist administrative officials in mediating disputes between merchants and factory owners, marking the beginning of a labour conciliation institution in France’.

International conciliation, in the sense of international law, is one of the methods of international dispute settlement. The Convention for the Peaceful Settlement of International Disputes (1899 Hague Convention), adopted by the First Hague Peace Conference in 1899, which provides for ‘international investigation, good offices, conciliation and arbitration’, without the word ‘conciliation’ in the above Convention. The 1907 Hague Convention for the Peaceful Settlement of International Disputes (1907 Hague Convention) also does not contain the word ‘conciliation’.

Regardless of the absence of the word ‘conciliation,’ the development of international conciliation and conciliation laid the foundation for the emergence of modern international conciliation. Some scholars (e.g. Nicolas, Ruth Donner, etc.) have suggested that this international investigation, which incorporates the right to make recommendations, will develop into a new form of conciliation, the modern international conciliation. The emergence and development of modern international conciliation was largely based on mediation and international investigation, and eventually turned into an international dispute resolution method that combines the characteristics of both while remaining independent of both. It was not until the 1920s that the modern international conciliation formally emerged, with the earliest practice appearing in the ‘Treaty of Blaine’ and later in the treaty signed between Chile and Sweden in 1920(mentioned in J.G. Merrills' book International Dispute Settlement 5th Edition). The early Bryan treaties introduced compulsory investigation and specified in the treaties that the disputing parties could not resort to force until the commission of inquiry had submitted its report (mentioned in S. M. G Koopnaaos' Diplomatic Dispute Settlement: The Use of Inter-State Conciliation). It is important to notice that the early Bryan treaties did not use the concept of international conciliation yet, but contributed significantly to the recognition of international investigations by states. Other scholars (e.g. Jean-Pierre Cot, S. M. G Koopmans) believe that the first European treaty to truly incorporate modern international conciliation was the Treaty of Arbitration and Conciliation between Switzerland and Germany, signed on December 3, 1921. The subsequent Locarno Convention (1925) and the Geneva General Act for the Pacific Settlement of International Disputes (1928) led to the further development of international conciliation. Following that, the Americas countries began to abandon the Bryan Treaty model, gradually replacing the commissions of inquiry with the term ‘conciliation commissions.’ In 1929, the General Convention of Inter-American Conciliation was signed by 20 countries of the Americas, and the status of international conciliation became clearer when the parties agreed to submit their disputes to the conciliation procedures provided for in the Convention. Since then, international conciliation has proliferated in bilateral, multilateral treaties and in dispute settlement regimes provided for by international organisations, such as the development of alternative dispute resolution mechanisms originating in the United States, the use of conciliation in international commercial disputes, the application of conciliation in the dispute settlement methods of the Washington Convention, and the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and the Rules of Procedure for Conciliation Proceedings developed under the Convention, thereby facilitating the settlement of related investment disputes.

Despite the considerable development of international conciliation in international treaties as well as in international organizations, its international practice is confronted with real problems. Many scholars and research institutions have attempted to define international conciliation clearly, for example, the Institute of International Law defined the concept of international Conciliation in International Rules of Procedure for Concilation Proceedings in 1961,‘International conciliation is a method of settling various international disputes by permanent or temporary conciliation commissions established by the parties to the dispute, which conduct an impartial examination of the dispute and seek to develop a separable solution.’ However, there is no consensus in the international community on the definition of international conciliation. Therefore, from the perspective of the characteristics of international conciliation, international conciliation is one that involves a third party and has general principles such as voluntariness, legality and reasonableness, and confidentiality.

3. Development of the Compulsory Conciliation System

Compulsory conciliation, by definition, is both 'compulsory' and 'conciliatory', combining the

compulsory nature of arbitration and litigation procedures with the flexibility of traditional conciliation procedures, i.e. the process of compulsory conciliation is compulsory but the outcome is not binding, so compulsory conciliation originates from conciliation but is distinct.

Jean-Pierre Cot, in his book International Conciliation, mentions that compulsory conciliation was written into French law in 1790. In 1969, the Vienna Convention on the Law of Treaties included compulsory conciliation in the dispute settlement mechanism for the first time, and the compulsory conciliation system formally entered the history books. Later, compulsory conciliation also appeared in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. After the inclusion of compulsory conciliation procedures in the dispute settlement system of the Convention at the Third United Nations Conference on the Law of the Sea and after a prolonged exchange of views, the United Nations Convention on the Law of the Sea was formally adopted in 1982. In it, the Convention's dispute settlement mechanism includes both ‘voluntary conciliation’ and ‘compulsory conciliation.’ What’s more, the discussion of compulsory conciliation and the related provisions of UNCLOS have also influenced the development of other treaties such as the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity.

As a breakthrough and innovation in international conciliation, unlike conciliation and international conciliation, the system of compulsory conciliation had not really been practiced since the entry into force of the United Nations Convention on the Law of the Sea until 2018, when Timor-Leste and Australia concluded a treaty on the delimitation of their maritime boundary under the conciliation of the Conciliation Commission, and the compulsory conciliation method chosen by Timor-Leste was the only viable method under the United Nations Convention on the Law of the Sea in the absence of other options.

In addition to the above-mentioned conventions, sovereign states, regional organizations, etc. have contributed to the development of compulsory conciliation systems at different levels and to varying degrees. For example,

The EU, which began discussing the implementation of ADR mechanisms in civil and commercial disputes in 1999 and formally adopted the Directive on Certain Questions Relating to Conciliation in Civil and Commercial Matters (EU conciliation directive) in May 2008 after a nine-year process. In EU conciliation directive, Article 5.2 provides for domestic legislation allowing member states to introduce compulsory conciliation without infringing citizens' right to access justice. On this basis, European countries have implemented conciliation schemes of varying degrees of compulsion. For example, Romania amended its civil procedure code in 2010 to require compulsory conciliation in all civil cases before the start of proceedings; Slovenia introduced a quasi-compulsory conciliation scheme in 2009, from which parties can apply to withdraw; and Italy, through a government decree in 2011, made conciliation a prerequisite for litigation in disputes such as banking, insurance contracts, real estate, and medical malpractice, among others.

In Turkey, the Labour Court Law was enacted on October 25, 2017 and became effective on January 1, 2018, with the support of the project ‘Development of Conciliation Practice in Civil Disputes in Turkey,’ co-funded by the Swedish International Development Cooperation Centre and Turkey and implemented by the European Commission. Following this, Turkey formalized the compulsory conciliation system, mainly through the qualification of the field, the compulsory application of conciliation procedures, and the enhanced supervision of mediators.

In Greece, the Regulation on the Implementation of the Economic System Reform Adjustment Programme was enacted in January 2018, with the addition of the establishment of a Central Conciliation Council and the provision of a compulsory conciliation system in certain cases. In Article 182, it provides for some types of cases to be subject to conciliation procedures before litigation, and the scope of cases includes securities trading contracts, medical malpractice, patents,

trademarks, and designs, family law, and the adjacent rights [8].

In China, the Law of the People's Republic of China on Futures and Derivatives was voted on by the Thirty-fourth Session of the Standing Committee of the Thirteenth National People's Congress on April 20, 2022, and officially came into effect on August 1, 2022. This legal provision specifies a civil compensation litigation system, introduces mandatory conciliation, and establishes a diversified mechanism for the resolution of future disputes.

The application of the compulsory conciliation mechanism in domestic law will have a catalytic effect on the development of international conciliation and will also promote the international community's research on compulsory conciliation and its related practices.

4. Dilemmas in Promoting a Compulsory Conciliation System

The mandatory conciliation system has its strengths but also certain weaknesses, which lead to certain difficulties in its promotion.

About the advantages of compulsory conciliation, the benefits of mandatory conciliation may, by far, stem more from its characteristics. They are mainly manifested in the following ways: Firstly, they are more flexible. Conciliation should fully respect the will of the parties to the dispute and be flexible and optional, whether procedurally or otherwise. For compulsory conciliation, while the inclusion of compulsory conciliation makes the dispute settlement mechanism more complex, it is also undeniably more flexible. Only the exact degree of flexibility will vary depending on the treaty provisions. Secondly, the consequences are not constraining. Unlike arbitration, litigation, etc., the consequences of conciliation itself are not directly legally binding, and compulsory conciliation is no exception. In other words, compulsory conciliation is only compulsory in terms of procedure; the report or recommendation of the conciliation commission is still not legally binding on the parties to the dispute, which means that the result made by the conciliation commission, for example, is to some extent only a recommendation and cannot directly and compulsorily bind the disputing parties unless they agree to it.

However, there are also inherent flaws in the system of compulsory conciliation. For one thing, compulsory conciliation does not cease in the absence of one of the parties to the dispute. In article 12 of Annex V to the United Nations Convention on the Law of the Sea, the non-acceptance of compulsory conciliation proceedings by one or more parties to the dispute shall not prevent the proceedings from proceeding. And Article 3 of Annex V provides that when one of the parties to the conciliation has not made the appointment of a conciliator within a certain period of time, the other party to the conciliation has two options: the option of simply terminating the conciliation proceedings or the possibility of requesting the Secretary-General of the United Nations to make the appointment. This implies that the compulsory conciliation procedure would have continued even without Article 12 of Annex V where one of the parties to the dispute did not participate [9]. Secondly, the consequences of the non-binding nature of the settlement could affect the substantive resolution of the dispute. As mentioned earlier, compulsory conciliation is only procedurally mandatory and the result is not binding, which means that as long as one of the parties to the dispute does not agree, the result of the conciliation is not binding and the dispute may not be resolved substantively. And finally, more importantly, it may challenge the essence of conciliation to a certain extent. The aforementioned factors may, to a certain extent, challenge the connotation and essence of conciliation, as international conciliation is essentially a non-compulsory third-party dispute resolution process, and both the process and the outcome of dispute resolution should be optional for the disputing parties. To some degree, the emergence of compulsory conciliation conflicts with the very essence of conciliation, i.e., conciliation as a non-compulsory procedure. The emergence of compulsory conciliation has, to some extent, allowed the voluntary principle of the

conciliation system to be compromised and discounted in the procedure of conciliation, but this only means that the party initiating the procedure has obtained the prior consent of the other party to the dispute.

5. Conclusions

The modern conciliation system is the result of the common development of the international community. The compulsory conciliation system, as a breakthrough and innovation in international conciliation, occupies a place in the dispute resolution path. China is a 'disadvantaged group' in terms of maritime issues, with relatively unfavourable maritime geographical conditions, and has had maritime disputes with Japan and South Korea. China is a member of the United Nations Convention on the Law of the Sea (UNCLOS), and in the event of a maritime dispute, China may be either the initiator or the passive party to a compulsory conciliation process under the Convention. As far as the initiating party is concerned, the development of the compulsory conciliation system and the success of the East Timor and Australia compulsory conciliation cases have shown to some extent that compulsory conciliation can also play an important role, and therefore, in the event of a maritime dispute, compulsory conciliation is also one of the dispute settlement options. As far as the passive party is concerned, the compulsory conciliation process does not stop in its absence; therefore, China should still respond well in advance and make full use of the process to safeguard maritime interests and national interests.

Furthermore, as stated in the preceding section, the use of compulsory conciliation procedures is not limited to maritime disputes, the application of compulsory conciliation to investment disputes, and for the Belt and Road investment disputes, will also provide a pathway option for dispute resolution, but the relevant elements of the countries along the Belt and Road should be taken into account.

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